NO. 21301

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

W. H. WATTENBURG and
WILLIAM P. OWENS,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

REPLY BRIEF OF APPELLANT WATTENBURG

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We reply to the several points of appellee's brief in the order there stated.

I. Count II of the Indictment Fails to State an Offense.

A. Count II Fails to Apprise of What is to be Met.

Appellee first urges that appellant's remedy was a bill of particulars. (B.A. 14).* This was

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* The notation B.A. __" refers to appellee's brief. The notation "A.O.B. __" refers to the opening brief of apellant Wattenburg.

precisely the argument rejected in Russell v. United States, 369 U.S. 749, 770 (1962). The scope of Count II is so sweeping as to make it a virtual blank check, and a bill of particulars here would have been a charge by the prosecuting attorneys and not by the grand jury. See p. 11, infra.

Appellee next points to the pretrial motion of appellant Wattenburg to suppress evidence, and asserts that Wattenburg "knew from the outset what trees the Government was talking about and from whence they came." (B.A. 15). This is a distortion of the record. In November, 1965, Investigator Adams and Ranger Kennedy went to the Frank Palmer cabin and took from the premises a group of white fir Christmas trees which were stored there and which, as it turned out, had nothing to do with the case. (2 R. 237-238). Wattenburg, however, laboring under the impression that the Government would not take his property without reason and that these trees therefore had some relevance, moved before trial to suppress "Stumps No. 6, 7, 10, 24, 25, 28, 34, 35 and 36 taken from the real property known as Frank's Cabin". (1R. 14). As appears from P. Ex. 17, which was disclosed only at the end of the trial (5R. 951), none of these stumps had come from the trees taken from the Cabin, but from stumps located at different places in Sections 22 and 23. Contrary to appellee's assertion (B.A. 15, f/n), the so-called "theft

area" was never discussed at the hearing of the motion to suppress. (2 R. 2-34). It was there developed that Investigator Adams went to the Cabin (2 R.4) and there obtained evidence which he turned over to the United States Attorney. (2 R.6). But this "evidence" was the trees taken from the Cabin property which had nothing to do with the Government's case.

Going completely outside the record, appellee asserts that prior to trial Wattenburg sued Investigator Adams "alleging damages as a result of the said Adams' search of the theft area." (B.A. 15, f/n). This is also a gross distortion. Wattenburg sued Adams for breaking in to the mining claim and taking from the Cabin property the trees there stored - trees which were concededly Wattenburg's property. (2R. 238).

The claim that Wattenburg knew what trees the Government claimed to be stolen or where they came from is made out of whole cloth. Indeed, the record demonstrates that Wattenburg believed that the case involved trees which were his and which were unlawfully taken from the Cabin property by Adams.

B. The Record Would Not Protect Against a Subsequent Prosecution Under Count II

We have no quarrel with appellee's statement that it is the record which determines the extent to which a former conviction bars a subsequent prosecution. We so stated the matter in our opening brief. (A.O.B. 23-24).

It is P. Ex. 17 which purports to show the locations from which the trees were taken. Wholly without respect to the affidavit of the forester, Nicklos,* a mere visual inspection of the exhibit demonstrates that it would be impossible to lay out on the ground the boundaries of the "Christmas tree cut units" or, with the exception of the nine numbered stumps, to ascertain what trees came from what areas. There is no evidence fixing the number of trees coming from any of these areas.** All that appears is that from seven crudely sketched areas 1033 trees were missing.

Appellee suggests that appellants would have a good plea of former jeopardy in respect of a theft of <u>any</u> red fir tree taken from any part of Sections 21 and 22 in 1965. (B.A. 17). This could be so only if the record showed that these two entire Sections were denuded of <u>all</u> such trees. There is, of course, no such evidence, and appellee never made, or intended to make, any such claim.

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* Appellee asserts that this affidavit "consists largely of hearsay statements." (B.A. 17). The document (I R. 105-116) is strictly limited to the personal observations of the affiant.

** The vagaries of the matter are well illustrated by the testimony cited by appellee. Thus, (2 R. 59):

> "... about, oh, 75 yards up the hill I noticed fresh cutting ... I quick made an estimation of the amount of trees cut and there were approximately 75 to 100 trees in that particular area."

C. 18 USC §641 Does Not Extend to Real Property

Appellee advances two arguments for the proposition that 18 USC §641 extends to real property. (B.A. 17-23). First, appellee notes that the codifiers were concerned with the gaps and crevices separating particular larceny-type offenses at common law. Next, appellee urges that a word "steal" embraces the concept of taking real, as well as personal, property. These arguments lack substance.

A basic datum point in construing 18 USC §641 is that "the 1948 Revision was not intended to create new crimes, but to recodify those then in existence." Morissette v. United States, 342 U.S. 246, 269, f/n 28 (1952). Continuously since the First Congress there have been federal statutes denouncing stealing, embezzling and purloining.* If these crimes had any application to real property appellee could certainly produce at least one federal case where there had been a prosecution for stealing such property. It does not do so, and our research discloses none.

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* See, e.g., the Act of April 30, 1790, 1 Stat. 112, 116, Section 16 of which provided in part:

> "That if any person ... shall take and carry away, with an intent to steal or purloin the personal goods of another; or if any person ... shall for any lucre or gain ... embezzle, purloin or convey away any of [certain materials of war] he shall ... be fined ... and be publicly whipped..."

The distinction between real and personal property is a fundamental one, not only in the law of crimes but in all fields of law, and the "gaps and crevices" in the larceny type offenses have nothing to do with this fundamental difference. These "gaps and crevices" are specifically identified in Morissette, 342 U.S. at 273, footnote, as those resulting from the distinctions between common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement. These crimes are merged into 18 USC §641, but none is commissible in respect of real property.

Appellee's argument that the word "steal" enlarges the statute to embrace the taking of real property is shown to be unsound by the very cases it cites. In United States v. Turley, 352 U.S. 407 (1957) the Court quotes both from Black's Law Dictionary and from United States v. Adcock, 49 F. Supp. 351, 353 (W.D. Ky. 1943). The quotation from Black's (352 U.S. at 412) is that "'steal' 'may denote the criminal taking of personal property either by larceny, embezzlement or false pretenses.'" The quotation from Adcock, as relevant, is (352 U.S. at 411, f/n 6):

> "... the word "stolen" is used in the statute not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law ..."

Appellee next quotes from Boone v. United States, 235 F.2d 939 (4 Cir. 1956), but immediately preceding the quoted language the opinion states (235 F.2d at 940): "... we adopt the definition given by Judge Miller in United States v. Adcock", and then quotes it as we have done above. This very Court, the Ninth Circuit, has adopted the Adcock definition of "steal". Smith v. United States, 233 F.2d 744, 747 (9 Cir. 1956). It is thus apparent that the use of the word "steal" in 18 USC §641 works no such extraordinary expansion in respect of the larceny type offenses as appellee here argues for.

Appellee notes that Congress is not obliged to maintain common law distinctions between grand and petty larceny. (B.A. 21). But the question here is not whether Congress might obliterate the distinction between real and personal property in the larceny type offenses, but whether it has done so in 18 USC §641. We submit that it has not.*

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* The State cases lend little support to appellee's theory. Only two cases, both involving fences, aid appellee. Stephens v. Commonwealth, 304 Ky. 38, 199 SW 2d 719 (1947); Harberger v. State, 4 Tex. Civ. App. 26, 30 Am. Rep. 157 (1878). The federal cases hold that taking fences is not larceny. United States v. Wagner Fed. Cas. No. 16,630 (C.C.D.C. 1806); United States v. Smith, Fed. Cas. No. 16,325 (C.C.D.C. 1807). In McKenna v. State, 119 Fla. 576, 161 So. 561 (1934) the property taken was personalty under local law. Summerlin v. Orange Shores, Inc. 97 Fla. 996, 122 So. 508, 510 (1929). The same was true in Junod v. State, 73 Neb. 208, 102 N.W. 462 (1905). In State v. Donahue, 75 Ore. 409, 144 Pac. 755 (1914) the charge was stealing "500,000 feet of sawlogs", i.e., the case is the same as Magnolia Motor & Logging Company v. United States, 264 F.2d 950 (9 Cir. 1959).

Appellee urges that Count II alleges an offense since severed trees ultimately become personal property. (B.A. 23). But Count II says nothing about severed trees. Indeed, appellee urges that the first overt act of Count I "was explanatory of" the conspiracy count (B.A. 25), and that "the first overt act in Count I specified red fir trees, as does Count II." (B.A. 32). The first overt act of Count One states that Owens "cut and removed a quantity of Red Fir (silver tip) trees" (I R. 3), a plain reference to standing trees. Appellee finds it "difficult to imagine how trees can be described other than by their specie." (B.A. 23). But if such a case had actually been put to the grand jury, it would be simple enough to allege the taking of severed trees, lying on the Government's land and in its possession. Appellee argues that because trees "can ... become objects of larceny" an averment of stealing "trees" simpliciter is justified. (B.A. 23-24). This does not square with the authorities, which appellee ignores. (A.O.B. 27-28). One could with equal logic argue that an indictment alleging the sale of "a white powder" charges a violation of a narcotic statute because a white powder "could be" heroin. Finally, appellee advances the extraordinary argument that it was the burden of the defendants to prove that the trees were not personal property! (B.A. 24). But we are not dealing here with a proviso or exception to a statute or

regulation. The appellee had the burden on each essential element of the offense (Newsom v. United States, 335 F.2d 237, 239 (5 Cir. 1964)), and the existence of specific and specified personalty is such an element in an alleged violation of 18 USC §641. (A.O.B. 27-28). We will have to adopt an entirely new legal system before a defendant must prove that he is not guilty of stealing because the goods allegedly stolen did not exist. See Karn v. United States, 158 F.2d 568, 571 (9 Cir. 1946).

II Count I of the Indictment Fails to State an Offense

As appellee notes (B.A. 28-29), Count I of the indictment proceeds on two different bases, viz., a conspiracy to defraud the United States and a conspiracy to violate 18 USC §641 by stealing timber. The jury was instructed, over appellants' objection, on both bases, and advised that appellants could be convicted on either. (A.O.B. 49).

In respect of the conspiracy to defraud charge, the entire averment is that (I R. 2):

> " on dates to the Grand Jury unknown during October, 1965, in the County of Plumas ...
>
> W.H. Wattenburg, and
> William P. Owens,
>
> defendants herein, did conspire together and with one another and with others to the Grand Jury unknown to defraud the United States ..."

This is, of course, simply a charge in the language of the statute.

There is no crime of "defrauding the United States", and a charge of conspiracy to defraud the United States is a mere legal conclusion. Furthermore, this is not a self-describing offense like failing to file a particular income tax return or robbing a certain bank. Numberless factual situations may be shown in support of a charge of conspiracy to defraud the United States. (See pp. 17 to 19, infra.) This being true, an indictment simply reciting the language of the statute gives no notice and is invalid. As stated in United States v. Hess, 124 U.S. 483, 487 (1888), quoted with approval in Russell v. United States, 369 U.S. 749, 765 (1962):

> "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."

In Hess the prosecution was based on R.S. §5480, a statute "directed against 'devising or intending to devise any scheme or artifice to defraud' to be effected by communication through the post office." 124 U.S. at 486. Defendant there was charged in the language of the statute, and the pleading held bad because, just as here, there was an "absence of all particulars of the alleged scheme." Ibid.

Appellee urges that in conspiracy cases no details

need be given, citing Glasser v. United States, 315 U.S. 60 (1942). There, however, the manner and means which defendants agreed to employ to defraud the United States were fully set forth in the indictment. 315 U.S. at 66. Details of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of the conspiracy are not essential, but the manner and means must certainly be stated with sufficient particularity to give some idea of the nature of the scheme to "defraud." Pettibone v. United States, 148 U.S. 197, 203 (1892), cited with approval in the Russell case. (369 U.S. at 765).

A bill of particulars cannot save an invalid indictment. Russell v. United States, 369 U.S. 749, 770 (1962); United States v. Seeger, 303 F.2d 478, 484 (2 Cir. 1962). An indictment charging simply that A and B "conspired to defraud the United States" places virtually no limits upon the prosecution in furnishing a bill of particulars, substitutes the prosecuting attorney for the grand jury, and permits conviction "on the basis of facts not found by, and perhaps not even presented to the grand jury." 369 U.S. at 770. As stated in Van Liew v. United States, 321 F.2d 664, 672 (5 Cir. 1963):

> " ... the District Attorney is not the Grand Jury, and he may not determine what it is that the Grand Jury has charged."

The doctrine of aider by verdict, urged by appellee (B.A. 26), applies only to matters of form, not to matters

of substance. United States v. Hess, 124 U.S. 483, 489 (1888). Were it otherwise, Rule 34 of the Criminal Rules, requiring the arrestation of justice if the indictment does not charge an offense, would be meaningless in jury cases.

As respects the alternate charge of Count I of the indictment, the alleged conspiracy to steal wholly unspecified "timber", the indictment is no better than the averment of a conspiracy to defraud. If "explained" by the first overt act, as appellee urges (B.A. 25), it refers to standing timber, and charges the legally impossible. And, as appellee notes (B.A. 30-31), the word "timber" has an extremely wide variety of meanings. The use of the word "timber", without any specification as to type or location, comes nowhere close to according the "constitutional right to a fair and accurate accusation by indictment." United States v. Seeger, supra at 484.

III. The Motion to Suppress Should Have Been Granted

Although the Fourth Amendment denounces only unreasonable searches, whether a search is reasonable is not determined on an ad hoc basis, as appellee seems to suggest (B.A. 27), but within the framework of established principles. These are summed up in Smith v. United States, 335 F.2d 270, 273 (D.C. Cir. 1964):

> "Even where probable cause exists a warrantless search is forbidden unless made incident to a valid arrest or justified by exceptional circumstances, such as a significant possibility of removal or destruction of the object of the search."

Here there was a warrantless search, without either arrest or exceptional circumstances. The search was therefore forbidden, i.e., unreasonable as a matter of law, unless the ordinary rules do not apply.

To avoid the usual principles appellee urges the "open field" doctrine, and on this score misconceives appellant's argument. Appellant's argument (A.O.B. 39-40) is not that the "open field" doctrine is non-existent but that on the testimony of the Government's own investigator it has no application here. The undisputed evidence of Investigator Adams is that the search was conducted "immediately adjacent" to the home of appellant Wattenburg - in the trial court's words, in Wattenburg's "backyard". (A.O.B. 12-13). The search was not conducted "in an open field about 250 yards from defendant's house", as in United States v. Hassell, 336 F.2d 684, 685 (6 Cir. 1964), or in a shack "some 500 feet to the rear of the ... residence," as in United States v. Thomas, 216 F. Supp. 942, 944 (N.D. Cal. 1963), or in a cave in a plowed field "approximately 125 yards west or northwest of the house," as in Care v. United States, 231 F.2d

22, 24 (10 Cir. 1956).* The "open field" in this case is merely a turn of phrase of appellee's counsel, contrary to appellee's own evidence.

We note that appellee fails to respond to our submission (A.O.B. 40-41) that it would be a bizarre rule which would entitle the prosecution to search and seize without warrant or arrest in what is claimed to be an "open field", and then obtain a conviction of theft on the theory that stolen property there found is evidence of theft by the occupant of the field because in his "possession".

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* Appellee's other citations are not in point. In Janney v. United States, 206 F.2d 601 (4 Cir. 1953), there was no search at all. A seizure of articles already seen was made pursuant to a valid arrest. In Hester v. United States, 265 U.S. 57 (1924) there was neither search nor seizure; the officers simply picked up abandoned jugs of moonshine. In both Carney v. United States, 163 F.2d 784 (9 Cir. 1947) and Gay v. United States, 8 F.2d 219 (9 Cir. 1925) there were search warrants and valid arrests. The statements in the two last-cited cases that a garage appurtenant to a residence may be searched without a warrant are contrary to Taylor v. United States, 286 U.S.1 (1932) and Temperani v. United States, 299 Fed. 365 (9 Cir. 1924).

IV. The Evidence Does Not Support the Verdict on Count I

In its discussion of this subject, appellee makes no effort to show that the evidence supports the charge of conspiracy to defraud the United States, albeit the jury may have convicted appellants on Count I on this theory -- a subject we discuss at pages 17, 20, infra.

The evidence in this case respecting "timber" deals exclusively with very small red fir trees. That large, standing red fir trees may be "timber" is beside the point, for there is no evidence that the trees in this case were anything other than small trees usable only as Christmas trees. The government's own witness referred to what was involved as "Red Fir Christmas trees." (5 R. 892). The authorities are unanimous that such trees are not "timber". (A.O.B. 42-46).*

Appellee argues that its failure to prove anything about timber is a mere variance, because appellants "knew that the government was talking about trees, specifically red fir trees," and had moved to suppress the nine trees seized at the Hideaway. (B.A. 32). Of course appellants knew that Count II had to do with red fir trees because theft of such trees was there charged. But if these same trees were the subject matter of Count I, the charge of

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* The only question in United States v. Brown Wood Preserving Company, 275 F.2d 525 (6 Cir. 1960), cited by appellee, was whether turpentine was timber.

Count I is as inexplicable as the Government's carrying off the white fir trees stored at Palmer's Cabin. (See p. 2, supra). If the grand jury intended that Counts I and II refer to the same property, Count I would logically have alleged a conspiracy to steal "Red Fir (silver tip) trees" located in the Plumas National Forest, the subject matter of Count II, not "timber" unspecified as to both type and location. Thus, under the theory of "variance", the Court is asked to affirm a felony conviction on the basis of a guess that what was involved in two quite differently stated counts was in fact the same.

V. The Evidence Does Not Support the Verdict on Count II

Appellee's review of the evidence (B.A. 33-35) demonstrates, we submit, that the alleged violation of 18 USC §641 lies completely in the realm of speculation. Appellee stresses the point that the charge includes "conversion" of the trees. (B.A. 32). But appellee elsewhere recognizes that conversion is a term which has always been used in connection with interferences with goods or personal chattels. (B.A. 23).

Appellee again suggests that the trees in the instant case "could be" the subject of larceny if they were left to lie before being asported, (B.A. 33), but points to no evidence that this in fact happened. There is no such evidence.

VI. The Instruction Respecting "Defrauding the United States" Should Not Have Been Given

We have previously shown that the indictment was fatally defective as respects the charge of "defrauding the United States". (Supra, p.10). For this reason alone it was prejudicial error for the trial court to read to the jury this language from the indictment (7 R. 17) and to instruct on the subject (7 R. 19-20) thereby permitting the jury to convict on this theory. Furthermore, there was no evidence to warrant the instruction.

Appellee argues that a conspiracy to defraud the United States "extends to any conspiracy which impairs, obstructs or defeats, the lawful function of any department of the United States" (B.A. 36), citing United States v. Johnson, 383 U.S. 169 (1966) and other cases. None of these cases either so states or holds, and it is apparent from Hammerschmidt v. U.S., 265 U.S. 182 (1924) that this is not the law. In Hammerschmidt, defendants circulated handbills urging persons subject to the Selective Service Act to refuse to obey it. Conduct more likely to impair a lawful function of government can scarcely be imagined, yet this was held not to be a conspiracy to defraud the United States.

In United States v. Johnson, 383 U.S. 169, 172 (1966) and Dennis v. United States, 384 U.S. 855, 861 (1966), cited by appellee, the Court quotes from Haas v. Henkel,

216 U.S. 462, 479 (1910) the language that the statute reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." In appellee's statement of the supposed rule the underscored language has been omitted, doubtless because there is absolutely no evidence that either appellant had any such purpose. The jury could find that Christmas trees were taken by someone from appellee's land, but no one could find that the purpose of the taking was to interfere in any way with any governmental function.*

A reading of the cases cited by appellee, and the cases on which those authorities rely, shows that the crime of conspiracy to defraud the United States requires underhanded conduct engaged in for the purpose of causing a representative of the Government to take some sort of action beneficial to the conspirators and detrimental to the Government's operations. Thus, in Johnson v. United States, 383 U.S. 169 (1966) and Glasser v. United States, 315 U.S. 60 (1942), the defendants approached the Department of Justice for the purpose of obtaining the dismissal of

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* Appellee argues that "it can hardly be doubted that the conspiracy charged in this case impaired, obstructed and defeated the Government in its operation of National Forest land and the proper functioning thereof." (B.A. 37). There is no such evidence; indeed, no such claim was even made below.

indictments, in Johnson by the exertion of influence, and in Glasser by bribery. In Dennis v. United States, 384 U.S. 855 (1966) defendants filed a false non-Communist affidavit in order to obtain the services of the N.L.R.B. Lutwak v. United States, 344 U.S. 604 (1953) and United States v. Vasquez, 319 F.2d 381 (3 Cir. 1963) both involve representing "phony" marriages with aliens as genuine for the purpose of gaining admission to the United States. Haas v. Henkel, 216 U.S. 462 (1910) involves the bribery of a Government official to obtain the revelation of confidential information of the Department of Agriculture. In Harney v. United States, 306 F.2d 523 (1 Cir. 1962) defendants fraudulently prevented an honest appraisal of land to be taken for a federal aid highway for the purpose of causing the Government to pay more than true value. And United States v. Furer, 47 F. Supp. 402 (S.D. Cal. 1942) involved bribery of Government agents to obtain Government contracts.

None of these cases is remotely similar to the instant case. Nothing was done in this case for the purpose of causing any representative of the Government to do anything or for the purpose of impairing Government functions in any way. As elsewhere in its brief, appellee seeks to have this Court create a new crime - here, an omnibus offense which, if it existed, would swallow up and make surplusage of all other conspiratorial crimes in any way affecting

Government property.

Appellee urges that it was not required to prove that appellants conspired both to defraud the United States and to commit an offense against the United States, and that accordingly a failure of proof of conspiracy to defraud would not be reversible error. (B.A. 29). Assuming the validity of the premise, the conclusion is unsound. The rule of Turf Center, Inc. v. United States, 325 F.2d 793 (9 Cir. 1964) and Arellanes v. United States, 302 F.2d 603 (9 Cir. 1962) would presumably preclude a directed verdict on Count I although one branch of a conjunctive charge found no support in the evidence, but nothing in this rule permits instructing the jury on the law applicable to an unproved charge. On the contrary, even when the evidence is sufficient to support a conviction, it is reversible error to give an instruction on a state of facts which has no support in the evidence. Morris v. United States, 326 F.2d 192 (9 Cir. 1963).

Appellee equates its duty of proof with its right to instructions. The vice of this equation is that the jury could have found that there was no conspiracy to steal timber, but yet have convicted on Count I upon the notion, unsupported in the evidence, that appellants conspired to defraud the United States.

VII. The Prior Indictment Should Have Been Admitted In Evidence

Appellee first argues that there is no authority to support the admissibility of "a superseded indictment." (B.A. 37-38). But it is elementary that the pleadings of a party filed in a prior action which tend to disprove any material fact in a subsequent action are admissible, and this is true whether or not the pleading offered in evidence was superseded.* Dixie Sand & Gravel Corp. v. Holland, 255 F.2d 304, 310 (6 Cir. 1958); State Farm Mutual Ins. Co. v. Porter, 186 F.2d 834, 840 (9 Cir. 1951). In proceedings to which the United States is a party, this rule applies to an indictment which is, of course, a pleading by the United States prepared by its officers authorized to prepare such documents. United States v. Continental-American Bank & Trust Co., 79 F. Supp. 450, 453 (W.D. La. 1948).

Appellee finds it "noteworthy" that co-defendant Owens objected to the introduction of the prior indictment (B.A. 38), but fails even to suggest the relevance of this fact. We perceive none. Appellant Wattenburg was tried

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* We therefore do not pause to consider whether or how the indictment in this proceeding "superseded" the indictment returned earlier as the result of a separate grand jury proceeding.

with Owens because appellee chose to have it so, and a defendant is certainly not deprived of his right to introduce evidence relevant to his defense because as to a co-defendant the evidence is irrelevant.

Finally, appellee argues that the trial court had discretion to admit or reject evidence. (B.A. 38). But it is also the rule that where proffered evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility. Holt v. United States, 342 F.2d 163, 166 (5 Cir. 1965). This was a close case, built entirely on circumstantial evidence. The proffered indictment was strong evidence from the hand of appellee itself that appellant Wattenburg was not a party to the alleged crime of Owens, and the trial court's refusal to permit the jury to consider it cannot, we submit, be considered the proper exercise of judicial discretion.

CONCLUSION

We respectfully submit that the judgment of conviction of appellant Wattenburg should be reversed, with directions to dismiss the Indictment.

Dated: July 10, 1967.

Stanley C. Young, Jr.

Richard Haas

Attorneys for appellant
W. H. Wattenburg

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard Haas

Richard Haas